

What Actually Happens in a Rulemaking?

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Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 **Admin. L. Rev.** 99 (2011), available at [SSRN](#).

[Wendy Wagner](#), [Katherine Barnes](#), and [Lisa Peters](#) provide a wealth of data and insights with respect to the rulemaking process in this well-researched and well-written article. They engaged in intensive empirical analysis of the ninety rulemakings in which EPA issued air toxic emission standards. For each of the rulemakings they studied three stages of the decision making process—pre-[NPRM](#), notice and comment period, and period after issuance of a final rule.

I cannot do justice to the authors' excellent discussion of their methodology and the implications of their findings. I will instead simply recite some of their most important findings in the hope that my summary of some of their findings will induce everyone to read this important article with care.

The authors found that the pre-NPRM period averaged a bit less than four years. During the pre-NPRM period, EPA engaged in an average of 178 contacts per rulemaking—more than twice the average number of comments EPA received after it issued the NPRM. Contacts with industry were 170 times greater than contacts with public interest groups and 10 times greater than contacts with state regulators during the pre-NPRM period.

The period between issuance of the NPRM and issuance of a final rule averaged 18 months. Industry accounted for 81% of the comments filed, while public interest groups accounted for 4% and governments accounted for 7%. The authors found that comments generally led to changes. 83% of the changes made between the proposed rule and the final rule had the effect of weakening the rule. Based on the changes made during the comment process, the authors drew the inference that EPA is influenced more by industry comments than by public interest group comments.

About 70% of the rules were changed after EPA issued a final rule—typically in response to a petition for reconsideration or a petition for review. Public interest groups participated almost as much as industry during this stage of the decision making process.

The authors also found that, while public interest groups did not participate actively or effectively with regard to the substance of the rules during the pre-NPRM period or during the comment period, they played “a forceful role ... with regard to the timeline” of many of the rulemakings. Thus, 73% of the rules were issued after a court issued an order with an action deadline at the behest of a public interest group.

In short, public interest groups influence the rulemaking process almost exclusively through their activities in court before and after the agency decision making process. I agree with the authors that this limited indirect role in the agency decision making process reflects the resource constraints of the public interest groups. They lack the resources required to participate effectively in the actual agency decision making process. This insight underlines the significance of the longstanding debate with respect to the standing of public interest groups to enforce public laws in courts. If they are denied access to the courts, public interest groups may have no means through which they can influence the agency decision making process.

Anyone who is interested in the rulemaking process must read this article. It is the most valuable source of data I have found on the subject.

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